## PUBLIC PROSECUTOR v. LOH SWEE KON & ANOR.

[Court of Appeal (Foster Sutton, C.J. (F. of M.), Brown, Ag. C.J. (S.) and Wilson, J.) August 13, 1951]

[F.M. — Criminal Reference No. 7 of 1951]

*Evidence — Evidence that accused had previously been charged with the offence of consorting and had been acquitted of that charge — Admissibility of.*

In this case the question arose in the course of a trial upon a charge of carrying a firearm under Regulation 4 of the Emergency Regulations, 1948. The accused had previously been charged with the offence of consorting under Regulation 5(1), and had been acquitted of that charge. As part of the evidence to substantiate the charge of carrying a firearm it was proposed to call as a witness the person with whom the accused was alleged to have consorted, and the learned Judge ruled that any evidence which tended to show that the accused had been guilty of the offence of consorting was inadmissible upon the charge of carrying a firearm, and in consequence of this ruling the witness was not called.

This question was referred to the Court of Appeal upon a certificate by the Attorney-General under section 33 of the Courts Ordinance, 1948. During the course of the argument the Attorney-General was given leave to amend the wording of his reference, which as amended read as follows:—

"Whether evidence, otherwise relevant and admissible, which shows or tends to show that an accused person had committed an act constituting an offence or part of an offence in respect of which he has been acquitted at a previous trial, is inadmissible at a subsequent trial even if the acts sought to be proved are so connected with the offence subsequently charged as to form part of the evidence upon which it is to be proved."

**Held**, that the law is that evidence which shows or tends to show that an accused person was guilty of an offence of which he had been acquitted is admissible at a subsequent (or the same) trial upon a different charge, provided that (a) the evidence is so connected with the offence charged as to form part of the evidence upon which it is to be proved, and (b) the evidence would not have been sufficient to establish the charge of which the accused was acquitted. To this extent, and with the limitation contained in (b), the answer to the reference is that such evidence is not inadmissible.

**Sambasivam v. Public Prosecutor**[4] distinguished.

**Murugiah v. Public Prosecutor**[5] — In so far as it purports to be authority for excluding any evidence which tends to show that the accused was guilty upon a charge of which he has been acquitted in considering his guilt upon another charge is overruled.

*Cases referred to:—*

(1) *Rex v. Bond* (1906) 2 K.B. 394.

(2) *Reg. v. Rearden* 4 F. & F. 76.

(3) *Reg. v. Ollis* (1900) 2 Q.B. 758.

(4) *Sambasivam v. Public Prosecutor* (1950) M.L.J. 145; 1 M.L.R. 128 (P.C.).

(5) *Murugiah v. Public Prosecutor* (1950) M.L.J. 282; 1 M.L.R. 217.

CRIMINAL REFERENCE.

*M. J. Hogan, K.C.* (Attorney-General) for the applicant.

*B. J. P. Joaquim* for the respondents.

*Cur. Adv. Vult.*

Judgment of the Court was delivered by:—

**Brown, Ag. C.J. (Singapore)**:— This question has been referred for our determination upon a certificate by the Attorney-General under section 33 of the Courts Ordinance, 1948. During the course of the argument the Attorney-General was given leave to amend the wording of his reference, which now reads as follows:—

"Whether evidence, otherwise relevant and admissible, which shows or tends to show that an accused person had committed an act constituting an offence or part of an offence in respect of which he has been acquitted at a previous trial, is inadmissible at a subsequent trial even if the acts sought to be proved are so connected with the offence subsequently charged as to form part of the evidence upon which it is to be proved."

The question arose in the course of a trial upon a charge of carrying a firearm under Regulation 4 of the Emergency Regulations, 1948. The accused had previously been charged with the offence of consorting under Regulation 5(1), and had been acquitted of that charge. As part of the evidence to substantiate the charge of carrying a firearm it was proposed to call as a witness the person with whom the accused was alleged to have consorted, and the learned Judge ruled that any evidence which tended to show that the accused had been guilty of the offence of consorting was inadmissible upon the charge of carrying a firearm, and in consequence of this ruling the witness was not called.

The exceptions to the general rule regarding the inadmissibility of evidence which shows that the accused has been guilty of criminal acts other than those with which he is charged were clearly stated by Lord Alverstone in *Rex v. Bond*[1]. And the first exception, in stating which Lord Alverstone made reference to the case of *Reg. v. Rearden*[2] is where "the acts sought to be proved are so connected with the offence charged as to form part of the evidence upon which it is proved." And in the earlier case of *Reg. v. Ollis*[3] the test was stated by Grantham, J. (at p. 766) to be as follows:—

"Was the evidence necessary to support the second indictment sufficient to prove a legal conviction on the first? If not, the evidence on the first charge can be used again, because it is being used in a different case, and on a different charge."

Now a charge of consorting contains two ingredients: first, it must be proved that the person with whom the accused allegedly consorted was carrying or had unlawful possession of arms or explosives. Secondly, it must be proved that the accused was found in that person's company "in circumstances which raise a reasonable presumption that he intends to or is about to act with, or has recently acted with, such

other person in a manner prejudicial to public safety or the maintenance of public order". If the circumstance upon which the prosecution relies to raise the reasonable presumption is the fact that the accused himself was found carrying a firearm, proof of that fact would not of itself be sufficient to prove the charge of consorting. It must also be proved that the person in whose company he was found was carrying an arm. And if there is insufficient evidence to prove the latter, though ample evidence to prove the former, the first ingredient which is necessary to prove the charge of consorting has not been established and the accused must be acquitted of that charge. Applying the test of Grantham, J., if the accused is subsequently charged with carrying a firearm, the evidence that he was found carrying a firearm can be used again, because this evidence was of itself insufficient to establish the earlier charge of consorting.

In ruling that the evidence of the person with whom the accused had allegedly consorted was inadmissible the learned trial Judge based his ruling on the authority of *Sambasivam v. Public Prosecutor*[4] and particularly upon the following passage from the judgment :—

"Here, the appellant having been acquitted at the first trial on the charge of having ammunition in his possession, the prosecution was bound to accept the correctness of that verdict and was precluded from taking any step to challenge it at the second trial."

Sambasivam had been charged at the first trial upon two charges — first with carrying a firearm, and secondly, with being in possession of ammunition. He had been acquitted on the second charge. At the re-trial of the first charge a statement by Sambasivam was put in evidence, which is fully set out in the judgment of the Privy Council. This statement contained passages which related both to the charge of carrying the firearm and to the charge of being in possession of the ammunition. The assessors at the re-trial were not informed that Sambasivam had been acquitted of the charge of being in possession of the ammunition, and this omission is criticised in the judgment upon the following ground :—

"Had the assessors realised that only a part of the statement could be relied upon they might have attached greater weight to the other criticisms regarding it and rejected it altogether."

Thus the criticism in the judgment is directed, not to the admission in evidence of the passages in the statement which related to the charge on which Sambasivam was acquitted, but to the failure "to inform the assessors that he had been found not guilty of being in possession of ammunition and was to be taken as entirely innocent of that offence". That this was the defect at which the criticism was directed seems clear to us when the paragraph containing the passage upon which the learned Judge based his ruling is read as a whole :—

"The effect of a verdict of acquittal pronounced by a competent court on a lawful charge and after a lawful trial is not completely stated by saying that the person acquitted cannot be tried again for the same offence. To that it must be added that the verdict is binding and conclusive in all subsequent proceedings between the parties to the adjudication. The maxim **'Res judicata pro veritate accipitur'** is no less applicable to criminal than to civil proceedings. Here, the appellant having been acquitted at the first trial on the charge of having ammunition in his possession, the prosecution was bound to accept the correctness of that verdict and was precluded from taking any step to challenge it at the second trial. And the appellant was no less entitled to rely on his acquittal in so far as it might be relevant in his defence. That it was not conclusive of his innocence on the firearm charge is plain, but it undoubtedly reduced in some degree the weight of the case against him for at the first trial the facts proved in support of one charge were clearly relevant to the other having regard to the circumstances in which the ammunition and revolver were found and the fact that they fitted each other."

That the criticism was not directed to the admission in evidence of the parts of the statement which related to the ammunition is, in our view, made clear beyond a doubt by the passage in the judgment in which the propriety of excluding the statement altogether is considered :—

"More important than these matters, however, was the reliance of the prosecution upon the statement of the 13th September which, if accepted as the truth, went to prove the appellant guilty of the charge upon which he had been acquitted as clearly as it proved him guilty of the offence the subject of the second trial. This circumstance might well have been made a ground for excluding the statement in its entirety for it could not have been severed satisfactorily. But the point was not taken and the statement was left to the assessors.....without any intimation that the prosecution could not assert or ask the Court to accept a substantial and important part of what it said."

The passages which we have quoted seem plainly to show that it would not have been wrong to have excluded the statement in its entirety, but that having admitted it a warning to the assessors was essential that as no reliance could be placed upon the parts of the statement which related to being in possession of ammunition, of which offence he must be regarded as entirely innocent, they must consider how far they could rely upon the parts of the statement which related to carrying the firearm.

It is to be observed that it is the correctness of the *verdict* which the prosecution may not challenge. But in the case before us the learned Judge gave his ruling before the witness had given any evidence, and as a result the witness was not called. If the witness had been called, and if the effect of his evidence had been that he was carrying a firearm and was in the company of the accused who was also carrying a firearm, that would

have challenged the verdict in the first trial, because that evidence was all that was necessary to substantiate the earlier charge of consorting. But if the witness's evidence had been confined to the fact that he saw the accused carrying a firearm, an essential element in proving the charge of consorting (viz. that the accused was found in the company of an armed man), would have been omitted. If that had been the effect of his evidence, the verdict in the first trial would not have been challenged because that evidence would not have been sufficient to establish the earlier charge of consorting and would thus have satisfied the test of Grantham, J. in *Reg. v. Ollis;* and as it was (in the words of Lord Alverstone in *Rex v. Bond*) "so connected with the offence charged (of carrying arms) as to form part of the evidence upon which it is proved" it would have been admissible. We agree with the learned Attorney-General that the objection was taken, and the ruling given, too soon.

The learned Judge's view that, upon the authority of *Sambasivam's case,* "any evidence showing that the accused consorted" was inadmissible finds support in the last paragraph of the headnote to the *Malayan Law Reports* at page 129. It is also supported by the Judgment in *Murugiah v. Public Prosecutor*[5]. In our opinion the Judgment in *Sambasivam v. Public Prosecutor* contains nothing which conflicts with the test laid down in *Reg. v. Ollis* or with the principle stated in *Rex v. Bond,* or with section 6 of the Evidence Ordinance. The law is that evidence which shows or tends to show that an accused person was guilty of an offence of which he had been acquitted is admissible at a subsequent (or the same) trial upon a different charge, provided that (a) the evidence is so connected with the offence charged as to form part of the evidence upon which it is to be proved, and (b) the evidence would not have been sufficient to establish the charge of which the accused was acquitted. To this extent, and with the limitation contained in (b), our answer to the question put to us is that such evidence is not inadmissible. It follows that the paragraph of the headnote in the *Malayan Law Reports* of the case of *Sambasivam v. Public Prosecutor,* to which reference has been made, is not correct; and that the case of *Murugiah v. Public Prosecutor,* in so far as it purports to be authority for excluding any evidence which tends to show that the accused was guilty upon a charge of which he has been acquitted in considering his guilt upon another charge, must be regarded as overruled.

*Order accordingly.*

## AL. AL. ALAGAPPA CHETTIAR v. RAMARATNAM NAIDU.

[Orig. Civ. Juris. (Paul Storr, J.) August 18, 1951]

[Johore Bahru — Originating Motion No. 12 of 1949]

*Japanese Judgments and Civil Proceedings Ordinance, 1946, s. 3 — Application of equitable principles under s. 3(2) — Civil Procedure Code s. 467 — Service on persons interested — When setting aside a Japanese Order held to be a nullity — O. 2 rr. 23 and 24 of the Civil Procedure Rules (Johore).*

In this Originating Motion the post-war administrator of the estate of St. P. S. Subramaniyan Chettiar deceased made an application under Section 3 of the Japanese Judgment and Civil Proceedings Ordinance to set aside an ex-parte Order of Court made during the Japanese occupation. During the occupation an order for the sale of the property belonging to the estate was applied for by the Official Administrator of Johore, who did not serve the application on the beneficiaries of the estate and there was no order made to dispense with service.

**Held,** (1) that order obtained by an administrator for sale of estate properties belonging to the estate of an intestate, without service of the application on some persons mentioned in Section 469 of the Civil Procedure Code (F.M.S.) is a nullity; (2) that the Court has power to impose terms on the party seeking to set aside a Japanese Order, while setting aside such order held to be a nullity.

*Cases referred to :—*

(1) *Craig v. Kanseen* (1943) 1 All E.R. 108; (1943) 1 K.B. 262.

(2) *In re Maria Hertogh* (1950) M.L.J. 214.

(3) *In the Estate of Haji Fatimah* 6 F.M.S.L.R. 154.

(4) *In re Ponder* (1921) 2 Ch. 59.

(5) *Lord Sudeley v. Attorney-General* (1897) A.C. 11.

(6) *Vanneck v. Benham* (1917) 1 Ch. 60.

ORIGINATING MOTION.

*Dr. C. H. Wilhers-Payne* and *A. Muthuswamy* for the applicant.

*K. A. Seth* for the respondent.

*Cur. Adv. Vult.*

**Paul Storr, J. :** — This is an application to set aside an order made by the Japanese Court during the Japanese occupation. It is made under section 3 of the Japanese Judgments and Civil Proceedings Ordinance No. 29 of 1946.

The terms of the application are :—

"That the Order of a Japanese Court dated the 21st day of February 2605 (1945) in Originating Summons No. 7 of 2605 (1945) in the Court of the Judge at Johore Bahru and issued on the same day giving liberty to Inche Suleiman bin A. Rahman as Official Administrator to sell all those pieces of land comprised in Surat